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Supreme Court, U.S.
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NO. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIAM R. BURT, and
JEAN P. BURT,

Plaintiffs-Appellants,

vs.

MAUI ARCHTICTURAL GROUP,
INC., and JAMES C. HESTAND,

Defendants-Appellees.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT, STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Defendants-Appellees.	)

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Respondents Maui Architectural Group, Inc. and James C. Hestand, Defendants-Appellees hereby submit this Brief in Opposition to the Petition for Writ of Certiorari to review the judgment of the Hawaii Supreme Court.

STATEMENT OF THE CASE

1. Mr. William Burt as owner contracted with Defendants-Appellees as architects for the design of a home owned

by him together with his wife Petitioner-Appellant Jean Burt. Although both Mr. and Ms. Burt's names were typed onto the contract with the Architects, Ms. Burt never signed the agreement. (See Findings of the Hawaii Supreme Court in Memorandum Opinion dated March 2, 1990, Appendix A-4 - A-11 to Petition.)

2. When Mr. Burt refused to pay all that was owed to Defendants-Appellees Architects, Architects, together with the Contractor for the house who Mr. Burt also refused to pay, filed an action to collect fees owed. (Maui Architectural Group, Inc., Konrad Ground dba Konrad Ground Contracting aka Ground Contracting, Inc. vs. W.R. Burt, Civil No. 5300(2), Second Circuit Court, State of Hawaii.) Ms. Burt was not made a party. Just as she had not signed the contract with Architects, she had also

not signed a contract with the Contractor.

3. Both the Architects' agreement and the Contractor's agreement contained binding arbitration clauses. The claims of the Architects and Contractor against Mr. Burt were decided against him in the arbitration. Judgment was entered in the trial court confirming the arbitration award against Mr. Burt. Ms. Burt never sought to intervene in the arbitration nor did the arbitration award result in a judgment against her.

4. Mr. Burt, who is a retired attorney, appealed the arbitration decision in Civil No. 5300(2) to the Hawaii Supreme Court (No. 12259) and to the United State Supreme Court (No. 88-575). Both appeals were unsuccessful.

5. In June, 1987, Mr. Burt, now joined by his wife Jean Burt, filed the

action William R. Burt and Jean P. Burt vs. Maui Architectural Group, Inc. and James C. Hestand, Civil No. 87-0279(3), Second Circuit Court, State of Hawaii, claiming that during the arbitration hearing, testimony by Architects indicated that Mr. Burt had been fraudulently induced to enter into the contract with the Architects and that he learned for the first time during the arbitration hearing that the Architects had breached a fiduciary duty owed to him and to Ms. Burt.

6. The allegations contained in the 107 paragraphs of the Complaint in Civil No. 87-0279(3) fail to assert Ms. Burt's standing to bring suit against the Architects and fail to identify any specific property loss she has suffered. The Complaint contains no allegations as to any violation of Ms. Burt's constitutional rights, nor could it as

Defendants Architects were not individuals acting under the color of any state law nor was any state action involved.

7. The Complaint was disposed of by way of a Motion for Summary Judgment by the lower court and affirmed by the Hawaii Supreme Court (No. 13198) on a finding that the claims were res judicata, having been determined in the arbitration as confirmed in the prior lawsuit and opining that Mr. Burt's proper remedy was to challenge the arbitration award rather than filing a separate lawsuit. (See Appendix A-10 - A-11 to the Petition.)

8. For the first time upon the Motion for Reconsideration to the Hawaii Supreme Court, the Burts suggested Ms. Burt had been deprived of her "fundamental rights guaranteed to her by

the Fourteenth Amendement to the United States Contitution." (See Appendix A-21 to the Petition.) The Motion was denied by the Supreme Court. (Appendix A-3 to the Petition.)

REASONS WHY PETITION SHOULD NOT BE GRANTED

This Court should not grant the Petition for Writ of Certiorari filed herein by Petitioners-Appellants William P. Burt and Jean P. Burt because the issues determined by the Hawaii Supreme Court are issues solely involving the interpretation and application of state law and are not issues of the character described by Rule 17.1 of the Rules of the United States Supreme Court or 28 USC Section 1257 (a), decisions which merit the Supreme Court's review.

Petitioners have misrepresented to this Court key facts which clearly reveal

the frivolousness of their Petition and mandate that it should not be granted. Specifically, Petitioners have failed to tell this Court that:

1. Ms. Burt was never a signatory to the contract with Respondents-Appellees herein. The contract could not have been enforced against her. Thus, she never had any property rights which were threatened by litigation of the contract claims in an action to which she was not a party.

2. Ms. Burt has never identified any property rights which allegedly have been injured.

3. Ms. Burt's claim of deprivation of her constitutional rights was never raised in any pleadings, motions, or brief on appeal. This claim was raised for the first time in a Motion for Reconsideration to the Hawaii Supreme

Court of its decision. (See Appendix A-16 - A-22 to the Petition.)

Rule 17.1 of the Rules of the Supreme Court describes three general types of case amenable to review, and 28 U.S.C., 1257(a), defines when a state court's decision may be reviewed by this Court.

It is obvious from the statement of the case above and from a reading of the decision entered by the Hawaii Supreme Court that there were no issues raised by the Complaint in Burt v. Maui Architectural Group, Civil No. 87-0279(3), that even remotely fall within those issues reviewable under Rule 17.1 and 28 U.S.C. 1257(a). The inclusion of a one sentence statement in a Motion for Reconsideration to the Hawaii Supreme Court that Appellant Jean Burt has been deprived of some property interest (not specified), by someone (not specified),

in violation of her constitutional rights is an untimely raising of the issue (see Berkness vs. Hawaiian Electric Co. 462 P.2d 196, 51 Haw. 437, 438 (1969): Points not argued in an appeal brief are deemed waived). A vague allegation as to deprivation of constitutional rights raised for the first time after an appeal is over should be recognized for the shoddy attempt it is to bootstrap the case into one that looks like it raise a constitutional issue meriting by this Court.

Respondents-Appellees respectfully ask this Court to deny Appellant's Petition for Writ of Certiorari.

DATED: Wailuku, Maui, Hawaii, AUG 30 1990

Boyce R. Brown Jr.

BOYCE R. BROWN, JR.
Attorney for Respondents-Appellees
MAUI ARCHITECTURAL GROUP and
JAMES C. HESTAND

STATUTORY AND RULE PROVISIONS

Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter or right, but a judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of

this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

28 U.S.C. Section 1257 (a)
Section 1257. State court; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is

drawn in question or where the validity of a stature of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

PROOF OF SERVICE

I, Boyce R. Brown, Jr., Esq. a member of the United States Supreme Court, and attorney for Plaintiffs-Appellees Maui Architectural Group, Inc. and James C. Hestand, hereby certify that all parties required to be served have been served in compliance with Supreme Court Rule 28.3, by depositing a copy of the foregoing document in a United States Post Office, First Class postage prepaid, addressed to the counsel of record at their post office address listed as follows:

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on this 30th day of August, 1990.

Boyce R. Brown Jr.

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